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No. 23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

CLINTON E. JENCKS, Petitioner

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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This memorandum is filed, at the suggestion of the Court, in response to that filed by the government. We address ourselves first to the second question discussed by the government because our position there would be determinative of all questions presented by the rulings of the trial court with respect to production of F.B.I. reports and by the character of the witness Matusow.

1. Does the Court's action in Mesarosh v. United States, decided October 10, 1956, require this Court to order a new trial in the present case?

Petitioner submits that this Court's action in Mesarosh requires this Court to order a new trial here. The basic question is not whether the recantation in itself casts "sufficient doubt on the conviction to call for a new trial and impel this Court to so order." (Govt. Memo. p. 2.) The

basic question rather is whether the professional informer witness' history as a chronic perjurer so infects the record as to require a new trial out of a "fastidious regard for the honor of the administration of justice". Communist Party v. Subversive Activities Control Board, 351 U.S. at 124. As we apprehend this Court's action in the S.A.C.B. case and the Mesarosh case, it was taken precisely on the ground just stated. And this was done in those cases although the perjury related to matters separate from the witnesses' trial testimony.

Central to both of the cited cases is this Court's policy "to make certain that the [trier of the facts] bases its findings upon untainted evidence." Communist Party v. Subversive Activities Control Board, 351 U.S. at 125. In that case the trier of the facts was an administrative agency and it remained in existence through the period of appellate review to determine the allegation of perjury and to "reconsider its original determination" upon a record freed from that cloud. (351 U.S. at 125.) In Mesarosh, on the other hand, the trier of the fact was a jury. At the end of the trial it had been separated and ceased to exist. It therefore could not examine the allegations of professional perjury. Nor could it reach a new verdict upon a record cleared of such a taint. In these premises then the doctrine of the S.A.C.B. case required a remand for a new trial before a new jury. No other course remained open, for this Court "cannot pass upon a record containing such challenged testimony" and the "fair administration of justice requires" nothing less than a judgment based upon a record free of perjury.

The situation is no different here. Here too the trier of the facts is a jury and the same procedure is necessary.

On the facts the case at bar presents a far more compelling call upon the policy enunciated in S.A.C.B. and Mesarosh. In Mesarosh the history of chronic perjury related (as it did in the S.A.C.B. case) to matters testified to in other proceedings following the trial testimony. The witness was a career informer and professional witness. Notwithstanding his post-trial perjury the government advised this Court that it still regarded the witness' trial testimony as "entirely truthful and credible".* The witness there was not involved in any judicial determination as to his professional perjury. Here the witness is Matusow, a renegade Communist and professional informer witness. He was one of those as to whom the challenge of professional perjury stood without traverse in the S.A.C.B. case. In United States v. Flynn (D.C. N.Y.) 130 F. Supp. 412, Judge Dimock found** that Matusow "lied" at the trial in that case as well as in testifying on the motion for new trial there. (130 F. Supp. 416, 420.) Judge Dimock found him to be a man with a "propensity to lie" induced by a "yearning for a place of importance." (Idem.) Matusow's lying in the S.A.C.B. hearing and the Flynn trial antedated his trial testimony here. The Subversive Activities Control Board, even before the decision of this Court in Communist Party v. Subversive Activities Control Board, found Matusow utterly unreliable, Subversive Activities Control Board, Report, Herbert Brownell, Jr., as Attorney General of the United States v. Labor Youth League, Docket No. 102-53, decided February 15, 1955, pp. 4, 5. Following this Court's decision in the S.A.C.B. case, the Board decided to reject Matusow's testimony in its entirety. New York Times,

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*Government's Motion to Remand. We cannot cite to page and line because we do not have a duplicate of the document filed. The quoted language appears in the fourth paragraph of the motion.

**From government documents including F.B.I. reports similar to those sought at the trial and on the hearing in the trial court in the instant case.

August 12, 1956. On the trial record here the fruits of Matusow's informer-witness role were shown to have brought him substantial rewards in money and association with the powerfully placed.* Prior testimony concerning Jencks had omitted three of the four incidents related at the trial. He had repeatedly lied about his residence for personal advantage. (See Pet. Br. p. 26, n. 9.) At the hearing on the motion for new trial the government contended and the trial court found that he had been corruptly induced to make a false recantation. Finally Matusow's testimony was essential to the government's case against petitioner.

In short, here the crucial government witness has now been determined to have been a chronic perjurer for personal gain** over a long period of time starting before petitioner's trial and ending some time thereafter. Whether here the government attorneys were "credulous" as Judge Dimock found in Flynn (130 F. Supp. at 420), we need not say. At least there is still unanswered a claim that contemporaneous records (the memorandum of the Crandall interview of Matusow; see Pet. Br. 39, 40) show that Matusow advised the government that he regarded as dishonest his grand jury testimony in this case. The policy that the fair administration of justice requires a new trial will rarely find more compelling justification than the facts here.

2. What disposition of this case should be made by the Court if it concludes that the trial court erred in denying one or more of petitioner's several motions for production of F.B.I. reports for inspection by the court at the trial or at the hearing on the motion for a new trial?

*His book, "False Witness", which was designated G.Ex. 9 in the record of the hearing on the motion for new trial, sets forth a shockingly cynical description of the "grooming" of Matusow as a witness and of the methods used to gain maximum publicity and earning power. See Ch. 2, 3, 4, 5, 7, 8.

**Described by Judge Dimock as "his craving for importance and his need of money." 130 F. Supp. at 420.

Petitioner urges that this Court's holding that the trial judge's ruling refusing to examine the contemporaneous informer reports would require a reversal for new trial. The determination of the relevance of these documents was for the trial judge in the setting of the trial. Any attempt to resolve that question now upon a cold record nearly three years after the trial, when the refining processes of two appellate reviews necessarily casts all issues in a new perspective, would have a quality of the unreal. This, we submit, applies whether the examination of the belatedly produced documents be made by this Court or the trial court.

The error of the trial judge irremediably prejudiced petitioner in the conduct of his defense. This, irrespective of whether inspection of the documents now shows a contradiction. Obviously, under Gordon v. United States, 344 U.S. 414, or Griffin v. United States, 336 U.S. 704, the finding of a contradiction now would require a new trial. But the issue of the fairness of the trial reaches much further. For the reasons urged in our briefs and at argument, petitioner was entitled to the trial judge's inspection of those documents and determination of their relevance. A determination that they were not relevant would have had serious bearing on petitioner's determination to take the stand and otherwise present a defense. He was not required to meet the government's case until he had by every available means tested its trustworthiness. The court's finding that the documents were not relevant would have afforded him important information by which he could have perceived both the extent to which he could impeach the case against him and the need for his own or other testimony to rebut it. No present determination as to the relevance of those documents can undo the course adopted by petitioner at the trial and subsequent to that court's ruling.

The government's position that relevance is to be determined now gives it an unfair advantage. The factors adverted to above giving a present determination a quality of unreality also place upon petitioner additional burdens in convincing the judge of the relevance of the reports. At the time of trial all counsel and the judge participate in a living process that gives each of them a keen awareness of the significance and interrelationships of all items of evidence. That capacity for perception, that sensitivity to the complexities of the evidence, necessarily recedes with time and preoccupation with other matters. They also tend to become warped by post-trial commitments to the verdict and decisions which follow. Receptivity to considerations that would upset these results is dulled by perhaps unconscious justification of the conduct of the trial and its outcome.*

The position here urged does not conflict with the practice of the Second Circuit in providing for appellate review of the requested documents when the trial judge refuses to give the defendant access to them. (See United States v. De Normand, 2 Cir., 149 F. 2d 622; United States v. Ebeling, 2 Cir., 146 F. 2d 254.) That practice is designed to afford review of the trial judge's ruling that the documents are not relevant. Right or wrong, the ruling was made and the accused had his opportunity to defend in

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*These considerations may apply with special force here because the trial judge persistently refused to examine the reports. At the hearing on the motion for new trial he ruled so promptly that the government had no opportunity to state its position. (H. 664, 107, 147.) Those rulings were made notwithstanding that the central issue of the hearing was Matusow's credibility and the documents were the only evidence giving some promise of reliability because made before the hydraulic pressures of interest had been generated by Matusow's career as a professional witness and his subsequent, allegedly corrupt, recantation.

light of it. But here no ruling was made. The trial judge abdicated his function, and petitioner was accordingly prejudiced irrespective of the relevance of the documents.

In sum, then, the rulings of the trial judge were part of the ingredients of an omelet which can no longer be unscrambled. The procedure suggested by the government is purposed to just that futile end. Petitioner was prejudiced by those rulings, and the only method of affording him a fair trial is to order that a new one be given him.

3. In the event this Court decides that the trial judge erred in its rulings on production of F.B.I. reports, should the Court decide the remaining questions relating to the adequacy of the charge?

We agree with and urge all that the government has said in these respects. Additionally it is to be observed that these questions present important problems in the interpretation and application of an important criminal statute. The charge here was modelled after that approved in Hupman, 219 F. 2d 243. (See Government's Brief, p. 49, n. 34.) That court's reasoning affords no light on the propriety of the charge. However, the charge was followed in Gold v. United States, now before this Court on writ of certiorari to the Court of Appeals, District of Columbia, and in Travis v. United States, now pending before the Tenth Circuit as No. 5379. Decision on these questions in this case will afford needed guidance in the interpretation and application of the statute.

Moreover, the determination of these questions can be rendered quite independently of problems presented by the rulings of the trial court on the production of informer

reports or Matusow's persistent perjury. The attack upon the instructions presents questions of law concerning the interpretation and application of the statute and adequate guidance to the jury. These are unaffected by the Matusow infection of this record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of five (5) copies of Petitioner's Reply to Supplemental Memorandum for the United States has this day been made upon Hon. J. Lee Rankin, Solicitor General of the United States, by airmail special delivery.

DATED: October 24, 1956.

JOHN T. McTERNAN